

JUDGE BUCHWALD

09 CIV 2645

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK TIMES COMPANY, TIMOTHY
O'BRIEN AND JO BECKER,

Plaintiffs,

- against -

BOARD OF GOVERNORS OF THE FEDERAL
RESERVE SYSTEM AND THE UNITED STATES
DEPARTMENT OF TREASURY,

Defendants.

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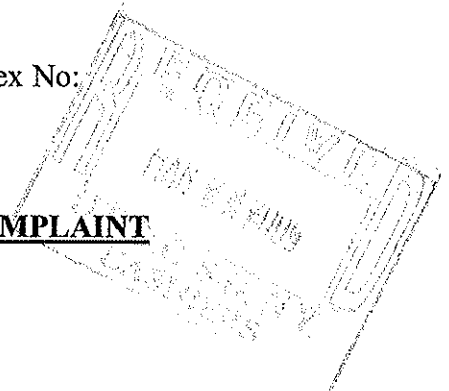
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COMPLAINT



Plaintiffs The New York Times Company, Timothy O'Brien, and Jo Becker
(jointly, "NYT"), by their undersigned attorney, allege for their Complaint:

THE PARTIES

1. The New York Times Company is the publisher of The New York Times ("The Times"). The newspaper's weekday circulation is the highest in the nation among metropolitan dailies at more than 1.07 million daily, and it has 1.5 million subscribers on Sunday. The average number of monthly unique visitors to NYTimes.com has reached 14.7 million in the United States alone. The New York Times Company is headquartered in this judicial district at 620 Eighth Avenue, New York, N.Y.

2. Plaintiff Timothy O'Brien is an editor at The Times who oversees the newspaper's Sunday Business section. The Times, on behalf of Mr. O'Brien, made requests

under FOIA to the Defendants for certain documents, and those requests are the subject of this Complaint.

3. Plaintiff Jo Becker is a reporter at The Times assigned to its investigative news team. The Times, on behalf of Ms. Becker, made requests under FOIA to the Defendants for certain documents, and those requests are the subject of this Complaint.

4. Defendant Board of Governors of the Federal Reserve System (“Federal Reserve”) is an agency of the federal government and has possession and control of the records that NYT is seeking. As the central bank of the United States, the Federal Reserve’s duties fall into four general areas: (1) conducting the nation’s monetary policy by influencing money and credit conditions in the economy in pursuit of full employment and stable prices; (2) supervising and regulating banking institutions to ensure the safety and soundness of the nation’s banking and financial system and to protect the credit rights of consumers; (3) maintaining the stability of the financial system and containing systemic risk that may arise in financial markets; and (4) providing certain services to the U.S. government, to the public, to financial institutions, and to foreign official institutions, including a major role in operating the nation’s payments system.

5. Defendant United States Department of the Treasury (“Treasury”) is an agency of the federal government and has possession and control of the records that NYT is seeking. Among its many functions, Treasury is charged with implementing and overseeing the Troubled Asset Relief Program (“TARP”), a program that allows the Department to purchase up to \$700 billion in assets and equity of financial institutions and to take other steps deemed necessary in order to strengthen the country’s financial sector.

JURISDICTION

6. This action arises under 5 U.S.C. § 552 et seq. (the “Freedom of Information Act” or “FOIA”). This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B).

VENUE

7. Venue is premised on the place of business of Plaintiffs and is proper in this district under 5 U.S.C. § 552(a)(4)(B).

8. Inasmuch as the Federal Reserve and the Treasury did not meet their legal duty to respond to NYT’s FOIA requests within the required time, NYT is relieved of any obligation to exhaust administrative remedies and is now entitled to appeal directly to the Court to enforce the dictates of FOIA pursuant to 5 U.S.C. § 552(a)(6)(C).

FACTS

9. This action arises from the failure of the Federal Reserve and the Treasury to disclose certain documents in response to several requests made by NYT pursuant to FOIA. While there has been a wholesale failure by the Defendants to meet the deadlines set by FOIA, NYT brings this action as to only certain critical requests, as enumerated below. NYT reserves its right to amend this Complaint and bring suit as to the other requests if the Defendants continue to fail to address them appropriately under FOIA.

FEDERAL RESERVE FOIA REQUEST No. 1

10. On November 25, 2008, NYT sent by Federal Express a FOIA request to the Federal Reserve ("Federal Reserve FOIA Request No. 1") for copies of various documents pertaining to the management of federal funds under The Emergency Economic Stabilization Act of 2008, commonly referred to as the Bailout of the U.S. financial system.

11. The documents relevant to this action from Federal Reserve FOIA Request No. 1 are as follows:

- a. Correspondences and phone logs of conversations between the Federal Reserve and firms about their funding under The Emergency Economic Stabilization Act of 2008, up to November 24, 2008.
- b. Memoranda, analyses, appraisals, audits, and other reports prepared by firms and/or the Federal Reserve related to the funding under The Emergency Economic Stabilization Act of 2008 drafted before November 24, 2008.

12. By a letter dated December 3, 2008, the Federal Reserve acknowledged Federal Reserve FOIA Request No. 1 and assigned to it the FOIA Reference No. 2009100129, but provided no documents.

13. In a subsequent communication on December 30, 2008, the Federal Reserve extended the period of its response to January 14, 2009, pursuant to 5 U.S.C. § 552(a)(6)(B)(i), in order "to consult with another agency or two or more components of the Board having a substantial interest in the determination of the request." This communication came six days after a substantive determination on the request was due from the Federal Reserve under FOIA, which was 20 business days from the receipt of the NYT request.

14. By a letter dated January 28, 2009, the Federal Reserve gave an updated response to Federal Reserve FOIA Request No. 1, indicating in relevant part that it had searched

its records and identified a large volume of responsive information and was in the process of obtaining this information and commencing confidentiality reviews.

15. As of this date, the Department has neither provided materials responsive to nor issued a denial of Federal Reserve FOIA Request No. 1.

FEDERAL RESERVE FOIA REQUEST No. 2

16. On January 9, 2009, NYT sent by Federal Express a FOIA request to the Federal Reserve ("Federal Reserve FOIA Request No. 2") for copies of "the appointment books, calendars, schedules, datebooks, phone logs or any other records of Ben Bernanke, Chairman of the Board of Governors, pertaining to discussions of all possible or actual federal emergency funding of financial services companies from January 1, 2007 to January 9, 2009."

17. By a letter dated January 14, 2009, the Federal Reserve acknowledged the Federal Reserve FOIA Request No. 2, assigned to it the FOIA Reference No. 2009100227, but provided no documents.

18. As of this date, the Federal Reserve has neither provided materials responsive to nor issued a denial of Federal Reserve FOIA Request No. 2.

FEDERAL RESERVE FOIA REQUEST No. 3

19. On February 3, 2009, NYT sent by Federal Express a FOIA request to the Federal Reserve ("Federal Reserve FOIA Request No. 3") for additional documents pertaining to the management of the Bailout and other federal programs formed in response to the subprime mortgage crisis. NYT also sought expedited processing of this request.

20. The documents relevant to this action from Federal Reserve FOIA Request

No. 3 are as follows:

- a. Minutes and any other documents or correspondence from January 2007 to date pertaining to the Federal Reserve Board's decision to invoke Section 13(3) of the Federal Reserve Act.
- b. Documents pertaining to the development and administration of programs created under the auspices of Section 13(3) of the Federal Reserve Act, including, but not limited to, the following:
 - i. Term Auction Facility
 - ii. Primary Dealer Credit Facility
 - iii. Asset Backed Commercial Paper Money Market Fund Liquidity Facility (AMLF)
 - iv. Term Securities Lending Facility (TSLF)
 - v. Commercial Paper Funding Facility (CPFF)
 - vi. Money Market Investor Funding Facilities (MMIFF)
 - vii. Term Assets Backed Securities Loan Facility (TALF)
 - viii. The Federal Reserve's Mortgage Backed Security Program announced on or about Nov. 25, 2008
 - ix. Maiden Lane, Maiden Lane II, Maiden Lane III
- c. Any documents, including but not limited to written or electronic correspondence, regarding the selection of BlackRock Inc., Goldman Sachs, Wellington Management, and Pimco to help manage the Federal Reserve's Mortgage Backed Security Program, including but not limited to any RFPs and communications between the Federal Reserve and Congress or the Treasury Department.
- d. Copies of contracts and contract specifications for BlackRock Inc., Goldman Sachs, Wellington Management and Pimco as it relates to the Federal Reserve's Mortgage Backed Security Program.
- e. Contract and contract specifications (including fees) and any correspondence pertaining to BlackRock's contract with the Federal Reserve to manage Maiden Lane assets as part of the government-orchestrated rescue of Bear Stearns.

21. By a letter dated February 17, 2009, the Federal Reserve granted expedited treatment of Federal Reserve FOIA Request No. 3, assigned it the FOIA Reference No. 2009100273, but issued no documents.

22. By a letter dated March 9, 2009, the Federal Reserve indicated it would not be able give a determination on Federal Reserve FOIA Request No. 3 within the twenty-day time limit set under FOIA or within the ten additional days provided by the statute, given the voluminous amount of records responsive to the request.

23. As of this date, the Federal Reserve has neither provided materials responsive to nor issued a denial of Federal Reserve FOIA Request No. 3.

TREASURY FOIA REQUEST No. 1

24. On January 9, 2009, NYT sent by Federal Express a FOIA request to Treasury ("Treasury FOIA Request No. 1") for copies of "the appointment books, calendars, schedules, datebooks, phone logs or any other records of Henry Paulson, Secretary of the Treasury, pertaining to discussions of all possible or actual federal emergency funding of financial services companies from January 1, 2007 to January 9, 2009."

25. By a letter dated January 27, 2009, Treasury acknowledged Treasury FOIA Request No. 1, assigned it a FOIA Reference No. 200901042, but provided no documents. The letter also indicated that in the event the accompanying NYT request for a fee waiver was denied, that Treasury would need a fee agreement to pay for duplication fees. The letter stated that if NYT did not respond in 30 days from the date of the letter, Treasury would close the file on the request.

26. By a letter dated February 9, 2009, NYT confirmed its continuing interest in Treasury FOIA Request No. 1 while asserting that the Treasury lacked the statutory authority to impose a "continuing interest" notice requirement upon a validly submitted FOIA request and then choose to ignore such a request if the notice requirement was not met.

27. On or about March 5, 2009, following a phone communication with Hugh Gilmore, Director of Disclosure Services at Treasury, NYT faxed a fee agreement for allowable charges under FOIA for Treasury FOIA Request No. 1, although the requirement of that agreement was contrary to FOIA under the circumstances.

28. As of this date, Treasury has neither provided materials responsive to the request nor issued a denial of the request.

TREASURY FOIA REQUEST No. 2

29. On February 3, 2009, NYT sent by Federal Express a FOIA request to Treasury ("Treasury FOIA Request No. 2") for copies of "any communication or record of communication between Timothy Giethner, Hank Paulson, Neel Kashakari, Dan Jester, Steve Shafran or Edward Forst from January 1, 2008 to January 9, 2009 regarding the Troubled Asset Relief Program ("TARP"), companies that have received TARP funds, the Federal Reserve's emergency powers granted under Section 13(3) of the Federal Reserve at and/or any programs authorized under those powers."

30. By a letter dated February 24, 2009, Treasury acknowledged receipt of Treasury FOIA Request No. 2 and assigned it FOIA Reference No. 200902054, but it did not produce any documents. In contravention of FOIA, Treasury indicated it would not begin processing the request until it received a fee agreement from NYT, and it would close the file on the request if NYT did not respond in 30 days.

31. Although the condition set by Treasury contravened FOIA, on or about March 2, 2009, NYT faxed to Treasury a fee agreement for Treasury FOIA Request No. 2.

32. By a letter dated March 10, 2009, Treasury granted expedited processing for Treasury FOIA Request No. 2 in accordance with 5 U.S.C. § 552(a)(6)(E)(v). Treasury also indicated it would require the additional processing extension of ten days to determine a response to the request.

33. As of this date, Treasury has not provided materials responsive to or issued a denial of Treasury FOIA Request No. 2.

TREASURY FOIA REQUEST No. 3

34. On February 3, 2009, NYT sent by Federal Express a FOIA request to Treasury ("Treasury FOIA Request No. 3") for various documents pertaining to the management of the Bailout and other federal programs formed in response to the subprime mortgage crisis. NYT also sought expedited processing of this request.

35. The documents relevant to this action from Treasury FOIA Request No. 3 are as follows:

- i. Correspondences and phone logs of conversations between the Federal Reserve and firms about their funding under The Emergency Economic Stabilization Act of 2008, up to February 3, 2009.
- ii. Memoranda, analyses, appraisals, audits, and other reports prepared by firms and/or the Federal Reserve related to the funding under The Emergency Economic Stabilization Act of 2008 drafted before February 3, 2009.
- iii. Records sufficient to show the terms of the funding for each firm that qualified for funding. Specifically, records that show how long the firms have to pay back any direct loans and the interest rates on the funds they have received; how long the federal government expects to own any distressed assets they have purchase from each firm, and the terms related to the purchase of those assets.

- iv. Records sufficient to show the securities posted as collateral from January 1, 2007 to February 3, 2009 by any institution extended credit as part of the Bailout by the Federal Reserve.
- v. Documents showing the terms governing any credit extended to any institution participating in the Bailout.
- vi. Copies of contracts and contract specifications for BlackRock Inc., Goldman Sachs, Wellington Management and Pimco as it relates to the Federal Reserve's Mortgage Backed Security Program.

36. By a letter dated February 5, 2009, the Financial Management Service, a bureau of Treasury, acknowledged receipt of Treasury FOIA Request No. 3, but indicated that it was not the lead component for Treasury on the Emergency Economic Stabilization Act. It then forwarded the request to the Disclosure Services bureau of Treasury.

37. By a letter dated February 24, 2009, the Disclosure Services bureau of Treasury acknowledged receipt of Treasury FOIA Request No. 3 and assigned it FOIA Reference No. 200902055, but it did not produce any documents. In contravention of FOIA, Treasury indicated it would not begin processing the request until it received a fee agreement from NYT, and it would close the file on the request if NYT did not respond in 30 days.

38. Although the condition set by Treasury contravened FOIA, on or about March 2, 2009, NYT faxed to Treasury a fee agreement for Treasury FOIA Request No. 2.

39. By a letter dated March 10, 2009, Treasury granted expedited processing for Treasury FOIA Request No. 3 in accordance with 5 U.S.C. § 552(a)(6)(E)(v). Treasury also indicated it would require the additional processing extension of ten days to determine a response to the request.

40. As of this date, Treasury has not provided materials responsive to or issued a denial of Treasury FOIA Request No. 3.

FIRST CAUSE OF ACTION

41. NYT repeats, realleges and incorporates the allegations in the foregoing paragraphs as though fully set forth herein.

42. The Federal Reserve, as an agency subject to FOIA, must release in response to a FOIA request any disclosable documents in its possession at the time of the request and provide a lawful reason for withholding any materials as to which it is claiming an exemption.

43. Under 5 U.S.C. § 552(a)(6)(A), the Federal Reserve was required to provide documents or issue a denial within 20 business days of receiving a request.

44. Under 5 U.S.C. § 522(a)(6)(C), a person making a request for materials under FOIA “shall be deemed to have exhausted his administrative remedies with respect to such a request if the agency fails to comply with the applicable time limit provisions” of FOIA.

45. Accordingly, NYT is deemed to have exhausted its administrative remedies as to Federal Reserve FOIA Request Nos. 1-3, and this Court has jurisdiction to hear this matter.

46. The Federal Reserve has asserted no lawful basis under FOIA for withholding the materials sought by Federal Reserve FOIA Requests Nos. 1-3.

47. The Federal Reserve’s failure to provide these materials violates FOIA.

48. NYT is entitled to an order compelling the Federal Reserve to produce these materials.

SECOND CAUSE OF ACTION

49. NYT repeats, realleges and incorporates the allegations in the foregoing paragraphs as though fully set forth herein.

50. Treasury, as an agency subject to FOIA, must release in response to a FOIA request any disclosable documents in its possession at the time of the request and provide a lawful reason for withholding any materials as to which it is claiming an exemption.

51. Under 5 U.S.C. § 552(a)(6)(A), Treasury was required to provide documents or issue a denial within 20 business days of receiving a request.

52. Under 5 U.S.C. § 522(a)(6)(C), a person making a request for materials under FOIA “shall be deemed to have exhausted his administrative remedies with respect to such a request if the agency fails to comply with the applicable time limit provisions” of FOIA.

53. Accordingly, NYT is deemed to have exhausted its administrative remedies as to Treasury FOIA Request Nos. 1-3, and this Court has jurisdiction to hear this matter.

54. Treasury has asserted no lawful basis under FOIA for withholding the materials sought by Treasury FOIA Request Nos. 1-3.

55. Treasury’s failure to provide these materials violates FOIA.

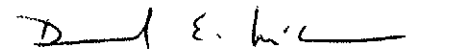
56. NYT is entitled to an order compelling the Treasury to produce these materials.

PRAYER FOR RELIEF

WHEREFORE, NYT respectfully requests that this Court enter judgment on its behalf:

- a. declaring that the materials requested by NYT from the Federal Reserve and Treasury are public under FOIA;
- b. directing the Federal Reserve and Treasury to provide those materials to NYT within 20 business days of the Court's order;
- c. awarding to NYT the costs of this proceeding, including reasonable attorney's fees as expressly permitted by FOIA; and
- d. granting to NYT such other and further relief as this Court deems just and appropriate.

Dated: New York, New York
March 23, 2009



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